control of one as much as the federal government received control of the other. It is hard to see why the federal government could encroach on the internal commerce of a state any more than the state government can take actual control of interstate commerce. The two forms of business are distinct. The powers to regulate the rates in the two forms of business are alike distinct. F. P. H.

DUTY TOWARD TRESPASSING CHILDREN WHERE A DANGEROUS ARTICLE IS LEFT IN THE STREET.—This much discussed question is once more the subject of a wide difference of opinion in a recent Michigan case. Defendant's driver left a drip wagon on the street at the close of the day's work. The wagon consisted of a platform on which a boiler was firmly fastened, on top of which was a vent hole which could be closed by means of a metal plug. When left in the street the tank was about one-third filled with drips and the vent was open. Neither the gas nor the mixture was explosive in itself, but when mixed with the proper proportion of air an explosive mixture is formed, and when brought in contact with fire an explosion will follow. Plaintiff, a boy about five and one-half years old, and a boy companion, between six and seven years old, were playing in the street and climbed upon the wagon. Plaintiff's companion dropped a lighted match in the vent hole and the tank exploded, injuring plaintiff. Plaintiff obtained a judgment in the trial court, and on error to the Supreme Court the judgment was affirmed by a divided court. *Iamurri* v. *Saginaw City Gas Co.* (1907), — Mich. —, 111 N. W. Rep. 884.

It is particularly interesting to note the equal division of the court and the decidedly opposite opinions expressed on both sides as to points involved. MCALVAY, C.J., and MONTGOMERY, CARPENTER and MOORE, JJ., for affirmative, hold (a) that an ordinance prohibiting any wagons or vehicles in the streets when not in actual use, was admissible as bearing upon the question of defendant's negligence: *Flater* v. *Fey et al.*, 70 Mich. 664; *Haines* v. *Lake Shore R. R.*, 129 Mich. 475; *Binford* v. *Johnston*, 42 Ind. 509; (b) that defendant's negligence was the proximate cause of the consequence; (c) that the action of plaintiff's companion, a child of tender years, was not an intervention of a responsible human agency; (d) that *Ryan* v. *Towar*, 128 Mich. 463, which holds that where plaintiff, an infant aged thirteen years, entered defendant's land and crawled into defendant's pumphouse and was injured in meddling with a water wheel therein, defendant was under no obligation of care towards such a trespasser upon his own *private* land and not liable for the injury, is not applicable to this present case, where defendant negligently left the drip tank standing in a *public* highway; (e) that *Powers* v. *Harlow*, 53 Mich. 507, where plaintiff, an infant of eight years, being by permission on defendant's land, found a dynamite cartridge in a common packing box among the sawdust, and proceeded to crack it on a stone and maimed himself for life, is authority for the rule that those who are chargeable with a duty of care and caution towards children must calculate upon the fact that they will act upon childish instincts and impulses and take precautions accord-

ingly; (f) that the case of *Kaumeier* v. *City Electric Railway,* 116 Mich. 306, where a street railway left a small flat-car unblocked upon its track in the highway and a child received injuries while playing on it, is easily distinguished from the principal case, in that there was no evidence of defendant's negligence since the defendant had the right to leave the flat-car standing upon the street-car track, whereas in this case defendant had no right to leave the wagon in the street; (g) that the intervention of human agency—at any rate, unless that intervention is a wrongful intervention—does not exempt a wrongdoer from the consequences where his wrong is one imminently dangerous to human life: *Skinn* v. *Reutter,* 135 Mich. 257; *Thomas* v. *Winchester,* 6 N. Y. 397; *Harrison* v. *Railway Co.,* 45 Ohio St. 11; *Binford* v. *Johnston,* 42 Ind. 508; *Fishburn* v. *Burlington Railway,* 127 Iowa, 483.

OSTRANDER, HOOKER, GRANT and BLAIR, JJ., for reversal, hold (a) that the leaving of the wagon in the street in violation of a city ordinance was not negligence, because it was the breach of no duty owed to plaintiff: *Flanagan* v. *Sanders,* 138 Mich. 253; *Stark* v. *Muskegon Traction Co.,* 141 Mich. 575; (b) that *Ryan* v. *Towar,* 128 Mich. 463, is authority for the rule, that a trespasser, whether an infant or not, cannot recover for injuries due to his trespassing, regardless of the attractiveness of the premises or things thereon to children; (c) that *Kaumeier* v. *Electric Company,* 116 Mich. 313, is authority for the rule that if personal property, mischievous only when set in operation, is left at rest in the highway and is set in motion by a trespasser, to whom the owner owes no duty of care, the owner is not liable to such meddler for any resulting injury, although he was an infant, and although the owner knew that infants had, and were again liable to, set the object in motion; (d) that *Powers* v. *Harlow,* 53 Mich. 507, is authority *only* for the holding that when a child is licensed to go upon land, he is *not a trespasser,* and that the owner owes it to such a person not to leave dynamite cartridges in a situation likely to attract his attention, and that the case *plainly intimates that had the child not been lawfully upon the ground, the holding would have been different.*

To sum up the arguments of both sides, it is seen that there are three main points disputed: First, the judges for the affirmative hold that defendant was negligent in leaving the wagon in a public highway contrary to a city ordinance; and the judges for reversal hold, that defendant was not negligent in this respect, because he committed no breach of duty as far as plaintiff was concerned. Second, the judges for the affirmative hold that defendant's negligence is further shown in that the wrong was one imminently dangerous to human life; while the judges for reversal hold that defendant's wrong was one dangerous only when set in motion by a meddler, in that it required a flame or red-hot metal to ignite the mixture of illuminating gas and air. Third, the judges for the affirmative hold that plaintiff can recover although he was himself a trespasser, because he is an infant; while the judges for the reversal hold that plaintiff cannot recover, because he was himself a trespasser, and it does not matter whether he was an infant or not.

And it is interesting to note that the answer of the judges for reversal to the first question involves the third question of whether plaintiff's being

an infant allows him to recover. The second contention of the judges for the affirmative, that the wagon and its contents were intrinsically dangerous to the public safety, strengthens their first contention, that defendant was negligent in leaving the wagon in the public highway; but neither of these contentions is considered of great importance, nor given much attention by the judges for reversal, who seem to rely upon the particular fact that it required a flame or red-hot metal to ignite the mixture of illuminating gas and air as a sufficient answer. It is to the third question involved that the judges for reversal give most of their attention. Can plaintiff recover although he was himself a trespasser, because he is an infant? This is the chief bone of contention. It is upon this point that the three leading cases of *Ryan* v. *Towar, Kaumeier* v. *Electric Co.,* and *Powers* v. *Harlow,* quoted above, are cited pro and con. In the words of HOOKER, J., "Whether we are to understand that one who meddles with the property of another upon the highway is not to be considered a trespasser, or that a person, though a trespasser, if he invades the land of another, is not a trespasser when he climbs upon a wagon in the highway, or that a child is not a trespasser in such a case, though an adult would be, although both would be trespassers if they entered upon land of another, is not made clear. There is another alternative, viz., that while one does not owe a duty to a trespasser upon land, he does to a trespasser upon the personal property in the highway, especially if the property is attractive enough to induce a child to trespass, and it goes without saying that in every such case it must have been so attractive or the child would not have trespassed. Everybody knows that he who invades and injures personal property of another is a wrongdoer and liable for the damages, although he be a child. The boy who blew up the gas wagon is liable as a wrongdoer, and would be though it had been accidental, because he was trespassing. Whichever horn of the dilemma is taken, we find the three cases cited an obstacle to recovery. They all say that an owner of property owes no duty to guard a trespasser, and that the rule applies to juveniles as well as to adults, and all admit that adults cannot recover in such cases." And he goes on to say that the case of *Ryan* v. *Towar* expressly repudiates the doctrine that the fact that the article trespassed upon is attractive to children makes a difference as to the legal relations of the parties, if the injury is due to a trespass, thus holding therefore that the "turntable cases" are radically wrong in principle and erroneous in their reasoning, and that the one ground which in his view it is perhaps possible for the judges holding for the affirmative to stand upon must go down. B. H.

COLLATERAL ATTACK ON INJUNCTIONAL ORDERS.—A recent decision in the United States Circuit Court of Appeals for the seventh circuit presents the question of collateral attack on an injunctional order in an interesting and novel way. Foreclosure proceedings had been instituted in a federal court, in which conflicting mortgage interests were represented by trustees for the holders of bonds secured by the mortgages, the bond holders themselves not being